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Modern Confession Law After *Duckworth v. Eagan*: What's the Use of Explaining?

*JULIA C. WEISSMAN*

**INTRODUCTION**

In *Miranda v. Arizona*,¹ the Supreme Court created safeguards to protect an individual's fifth amendment right² against self-incrimination in police interrogation. The Court determined in *Miranda* that custodial interrogation is inherently coercive.³ To ensure that a criminal suspect does not feel compelled to incriminate herself in the inherently coercive atmosphere of a police station, a police officer must notify the suspect of her rights under the fifth amendment before questioning her.⁴ Any statements that a suspect makes while in police custody are inadmissible unless she has first been advised of her rights,⁵ and has voluntarily, knowingly and intelligently waived these rights.⁶ *Miranda* requires that a suspect be advised that:

> [H]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.⁷

In a subsequent case, the Court held that the "content of *Miranda* warnings [need not] be a virtual incantation of the precise language contained in the *Miranda* opinion."⁸ As long as the officer conveys to the suspect the

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² U.S. Const. amend. V ("No person . shall be compelled in any criminal case to be a witness against himself").
³ *Miranda*, 384 U.S. at 458.
⁴ *Id.* at 444.
⁵ *Id.*
⁶ *Id.*
⁷ *Id.* at 479 (emphasis added).
⁸ California v. Prysock, 453 U.S. 355, 355 (1981) (per curiam). In *Prysock*, an officer told the juvenile defendant of his right to remain silent and that anything he said could be used against him in court. The officer then told him that he had the right to speak with a lawyer before questioning, to have the lawyer present during questioning, to have his parents present and to have a lawyer appointed at no cost. *Id.* at 357-58. The Court held that although the officer did not explicitly tell the suspect that he could have an attorney appointed at no cost who would be present before and during the questioning, the officer "fully conveyed to respondent his rights as required by *Miranda*." *Id.* at 361. The Court implied that the warnings would have been defective if they had linked the defendant's right to counsel to a future point in time after police interrogation. *Id.* at 360.
substance of her *Miranda* rights before the interrogation, the purposes of *Miranda* have been served.\(^9\)

*Duckworth v. Eagan*\(^10\) marks a further retreat from the precise holding of *Miranda*. In *Duckworth*, the police gave the indigent defendant the following *Miranda* warnings before questioning him:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.

In holding the defendant's resulting confession admissible, a majority of the Supreme Court reasoned that the warnings had sufficiently conveyed to him his right to have an attorney appointed before questioning.\(^12\) In contrast, the Seventh Circuit Court of Appeals had found that a suspect could misunderstand these warnings to mean that if he were indigent, and desired to have an attorney appointed, the attorney would not be available prior to questioning but instead would be appointed for him at trial. As a result, the lower court concluded that the warnings violated *Miranda* because they did not provide a "clear and unequivocal warning of the right to appointed counsel before any interrogation."\(^13\)

One of the justifications put forth by the *Miranda* Court for requiring pre-interrogation warnings was to ensure that suspects would be aware of their fifth amendment right not to incriminate themselves when in custody, where they are particularly vulnerable to pressure from police.\(^14\) Only a

\(^9\) Id.


\(^11\) Id. at 2877 (emphasis in original).

\(^12\) Id. Justice O'Connor, *id.* at 2881-85 (O'Connor, J., concurring), and Justice Marshall, *id.* at 2889-93 (Marshall, J., dissenting), also discussed whether this case falls under *Stone v. Powell*, 428 U.S. 465 (1976) (holding that defendant could not use a habeas corpus proceeding to claim the fourth amendment exclusionary rule if that issue had been fully litigated by the state court). The issue of whether *Stone* should be extended to prevent *Miranda* violations from being litigated in habeas corpus proceedings is beyond the scope of this Note.


\(^14\) According to the Court in *Miranda*:

> In order to combat these [custodial] pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be
suspect who understands his rights can truly make a free, voluntary choice about whether to speak. For this reason, *Miranda* warnings inform the suspect not only of his right to remain silent, but also of his right to an attorney who can ensure that he understands his rights. This, according to *Miranda*, prevents police from taking advantage of a suspect, regardless of his education or sophistication, who either does not understand or does not believe that he is free to refuse to answer questions. Nevertheless, while refusing to overrule *Miranda*, the Court has tolerated admission of confessions where the suspect has not fully understood his rights under the fifth amendment.

This Note examines how *Duckworth* fits into the current *Miranda* doctrine. Part I explains the basis of the holding in *Miranda* that custodial interrogation is inherently coercive. Part II first describes the Supreme Court's prophylactic rationale for interpreting cases under *Miranda*. It then discusses cases regarding the extent to which a suspect must understand her rights under *Miranda* before she can waive them. Finally, Part III argues that in *Duckworth* the Court has moved considerably toward abolishing *Miranda's* requirement of a knowing and intelligent waiver. In doing so, *Duckworth* reflects the Supreme Court's ambivalence about the extent to

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<td>For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise.</td>
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*Miranda*, 384 U.S. at 467-68; Escobedo v. Illinois, 378 U.S. 478, 490 (1964) ("[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights.").

15. As the *Miranda* Court noted:

It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. [W]hatever the background of the person interrogated, a warning at the time of interrogation is indispensable to overcome its pressures .

*Miranda*, 384 U.S. at 468-69; see also F INBAU, J. REID & J. BUCKLEY, CRIMINAL INTERROGA- TION AND CONFESSIONS 220 (3d. ed. 1985) [hereinafter CRIMINAL INTERROGAION] (purpose of *Miranda* was to assure that all persons, whether educated or not, would be aware of the right not to incriminate themselves).

16. See, e.g., Butzin v. Wood, 886 F.2d 1016, 1021 (8th Cir. 1989) (Lay, C.J., dissenting) (arguing that *Duckworth* reaffirmed the principle that in order to protect the privilege against self-incrimination, a suspect held for interrogation must be clearly informed of his right to have an attorney present during interrogation), cert. denied, 110 S. Ct. 2595 (1990); id. at 1019 (Beam, J., concurring) ("[I]n principle *Duckworth* did reaffirm *Miranda*."). In its most basic form, *Miranda* is still good law. For example, in People v. Trujillo, 784 P.2d 788 (Colo. 1990), statements were suppressed when the defendant was given no *Miranda* warnings at any time. Although the prosecution in that case argued that the defendant was not in custody, the interrogation occurred at the police station and the defendant was not told he was free to leave. *Id.* at 789.

17. See infra notes 50-89 and accompanying text.
which it should protect the constitutional rights of criminal suspects.

I. CUSTODIAL INTERROGATION AS A THREAT TO FIFTH AMENDMENT RIGHTS

Whenever law enforcement officers interrogate criminal suspects who are in custody, they must satisfy the requirements of *Miranda v. Arizona.*\(^{18}\) Writing for the Court in *Miranda,* Chief Justice Warren explained that the fifth amendment rights of individuals in that specific situation need special protection because police have a psychological advantage over a suspect in custody and can exert great pressure over her. Modern in-custody interrogations usually employ psychological rather than physical pressures.\(^{19}\) However, police often use psychological pressure to "subjugate the individual to the will of his examiner," even if the resulting statements are not actually "involuntary" in the sense that they have been obtained by force.\(^{20}\)

The *Miranda* Court outlined some of the techniques that police officers use to convince a suspect to confess to a crime. Police are trained to isolate the suspect in unfamiliar surroundings.\(^{21}\) The officer, then, has psychological advantages because a suspect in custody is not free to leave and because

\(^{18}\) 384 U.S. 436 (1966). Police need not administer *Miranda* warnings to a suspect who meets with them voluntarily. Oregon v. Mathison, 429 U.S. 492 (1977) (finding statements not preceded by *Miranda* warnings admissible when a police officer asked a defendant to come to the police station, told him he was not under arrest, and then discussed a burglary with him). But see Orozco v. Texas, 394 U.S. 324 (1969) (holding that a defendant was in custody so that the police should have given him *Miranda* warnings when the questioning took place in the defendant's bedroom after the police arrested him).

Also, the statement of a custodial suspect must satisfy the requirements of *Miranda* only if made in response to interrogation. See Rhode Island v. Innis, 446 U.S. 291 (1980) (where two police officers elicited a statement from the defendant by conversing between themselves in his presence about the danger to children from a missing gun, the Court held that *Miranda* did not apply because the statement was not made in response to interrogation).

\(^{19}\) *Miranda,* 384 U.S. at 448.

\(^{20}\) Id. at 457; see Schulhofer, *Reconsidering Miranda,* 54 U. Chi. L. Rev 435 (1987). According to Professor Schulhofer, *Miranda* recognized informal compulsion. Compulsion does not have to result from overcoming a person's will or imposing sanctions upon silence. It can result from having to make a choice between silence and an unappealing alternative. Schulhofer distinguished compulsion from actual coercion by pointing out that waiver can apply to compulsion but not to coercion. No one would knowingly waive her protection from having her will broken. Id. at 436-53. Long before *Miranda,* the Court recognized that the admission of involuntary or coerced confessions violates due process and the fifth amendment both because such confessions are inherently unreliable and because admitting such confessions encourages police brutality. See infra note 33.

\(^{21}\) *Miranda,* 384 U.S. at 449-50; see CRIMINAL INTERROGATION, supra note 15. The book was designed to serve as a manual for police interrogations. It advises law enforcement officers of the techniques they should use to effectively interrogate criminal suspects. For example, according to the authors, when setting up the interrogation room, the interrogator should:

*Remove all distractions.* Interrogation rooms should not contain objects that would in anyway distract the attention of the person being interviewed. Even small, loose objects, such as paper clips or pencils, should be out of the suspect's
interrogation takes place on the interrogator's "turf." When the suspect is at home with family and friends who are lending moral support, he is "more keenly aware of his rights and more reluctant to tell of his . . . criminal behavior." But "[i]n [the investigator's] own office . . . [t]he atmosphere suggests the invincibility of the forces of the law." In addition, officers use interrogation techniques that prey on the suspect's psychological weaknesses. The *Miranda* Court believed that adequate warnings would dispel this coercion. As a result, many of the interrogation techniques the *Miranda* Court discussed continue to be legal, so long as the suspect understands his rights and knowingly waives them. If an officer notifies the suspect of his rights before interrogation, and the suspect knowingly and intelligently waives those rights, any resulting statement is presumed to be the product of free choice rather than police pressure, and will not violate the fifth amendment.

reach so that he cannot pick up and fumble with anything during the course of the interrogation. Tension-relieving activities of this sort can detract from the effectiveness of the interrogation, especially during the critical phase when a guilty person may be trying desperately to suppress an urge to confess.

Id. at 29 (emphasis in original). The Court in *Miranda* quoted extensively from the first edition of this book to demonstrate how custodial interrogation can be coercive. *Miranda*, 384 U.S. at 449-55 (citing F. MINBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962)).

22. *Miranda*, 384 U.S. at 449-50 (citing C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1956)).

23. Id., see also Driver, Confessions and the Social Psychology of Coercion, 82 Harv. L. Rev. 42, 51 (1968) ("[W]hile isolated physically and socially from the groups which usually validate his ideas [the suspect] may well change his stated beliefs in the face of contradictory assertions of 'fact,' emotional inducements, and the possibility of gaining social acceptance."). Driver uses psychological and social science data to explain why custodial interrogations tend to be coercive.

24. For example, officers are instructed to "display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details . . . to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty." *Miranda*, 384 U.S. at 450. The officer first acts friendly to the suspect and tells him that what he did was not his fault but the fault of the victim or society. *Id.* If that does not work, the investigator "must rely on an oppressive atmosphere of dogged persistence interrogat[ing] steadily and without relent, leaving the subject no prospect of succese." *Id.* (citing C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956)).

25. Id. at 458; see also Schulhofer, supra note 20, at 460-61 (suggesting that once the Court determined that custodial interrogation was inherently coercive, the warning requirement was a compromise to allow police to continue to obtain confessions).

26. See Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law, 84 Mich. L. Rev. 662, 663 (1986) (arguing that these techniques, while still legal, are fundamentally at odds with the premises of *Miranda*). Grano argues that, while there is nothing morally wrong with the police taking advantage of the suspect's psychological and intellectual weaknesses in order to obtain a confession, if the premises of *Miranda* are true, then a suspect should not be able to waive his rights at all. *Id.*

*Miranda* specified that a police officer cannot obtain a valid waiver by trickery. *Miranda*, 384 U.S. at 476. Therefore, some of the techniques that concerned the Court in *Miranda* are no longer legal. For example, before *Miranda*, if a suspect wished to invoke his right to
II. EVOLUTION OF THE MIRANDA DOCTRINE

A. The Balancing Approach

The pre-interrogation warnings required by Miranda v. Arizona were not primarily intended to protect a criminal defendant’s interests in a truthful determination of guilt or innocence, but rather to protect the dignity of the accused. Miranda specifically protects the fifth amendment privilege against self-incrimination which prevents the government from forcing an individual to aid in his own prosecution. Supporters of Miranda argue that even if it does not itself seem offensive for police to obtain confessions without providing Miranda warnings, the use of those confessions to convict the suspect violates the dignity of the individual, and therefore violates the fifth amendment.
Since the Warren Court decided *Miranda* in 1966, the Supreme Court has moved away from the precise holding of that case—that custodial confessions not satisfying *Miranda*'s requirements always require exclusion. Characterizing *Miranda* as "prophylactic," subsequent decisions have reasoned that while the *Miranda* requirements serve to ensure that the state does not violate the fifth amendment, a violation of *Miranda* is not in itself a violation of the fifth amendment. The *Miranda* rules are prophylactic in the sense that while they provide a solution for the fifth amendment problems inherent in custodial interrogation, the Constitution does not require that particular solution. As a result, so long as the state does not violate either due process or the fifth amendment itself by admitting a confession that has actually been coerced, the Constitution does not require per se exclusion of the statement. Instead, in formulating rules for when to exclude confessions obtained in violation of *Miranda*, the Court has balanced the extent to which excluding the statement would further *Miranda*'s goals against the extent to which exclusion would hamper law enforcement.

The Court first began to limit *Miranda* based on the "prophylactic" rationale in *Harris v. New York*. In that case, the Court held that the

31. See *Miranda*, 384 U.S. at 476.
32. See *Tucker*, 417 U.S. 433; see also *Miranda*, 384 U.S. at 444 (requiring the stated warnings or a fully effective equivalent).
33. See *Malloy v. Hogan*, 378 U.S. 1 (1964) (applying the fifth amendment to the states and holding that the use of involuntary confessions violates the fifth amendment).

Before *Malloy* applied the fifth amendment to the states, the Supreme Court had held that the use of involuntary confessions violates due process because such statements tend to be unreliable, because they are unfair to the defendant and because excluding them deters unlawful police conduct. See, e.g., *Haynes v. Washington*, 373 U.S. 503 (1963) (the police held a defendant incommunicado for sixteen hours and refused to let him call his wife until he confessed); *Townsend v. Sam*, 372 U.S. 293 (1963) (a police doctor injected a defendant, who was suffering from withdrawal, with "truth serum"); *Rogers v. Richmond*, 365 U.S. 534 (1961) (the police threatened to take a suspect's wife into custody if he did not confess); *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960) (a mentally ill suspect questioned in a tiny room for eight to nine hours); *Brown*, 297 U.S. 278 (confessions obtained through physical torture); see also *Oregon v. Elstad*, 470 U.S. 298, 312 (1985) (actual "coercion" occurs when the police use "violence or other deliberate means calculated to break [the suspect's] will"). But see *Connelly*, 479 U.S. 157 (a confession held constitutionally admissible because the police complied with *Miranda* although the defendant, at the time he confessed, was insane and was hearing voices telling him to confess); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (a confession was voluntary even though the police tricked the defendant by misrepresenting to him during interrogation that a co-conspirator had confessed); *People v. Thompson*, 50 Cal. 3d 134, 785 P.2d 857, 266 Cal. Rptr. 309 (1990) (a statement was voluntary even though the police told the defendant that if he made a statement he could exonerate his pregnant girlfriend and have her released from custody).
34. 401 U.S. 222 (1971). The *Harris* Court did not actually use the term "prophylactic," but analyzed *Miranda* as if it were prophylactic and not a per se requirement. It distinguished a *Miranda* violation from a coerced statement which would have had to have been excluded per se; it then determined that the probative value of the uncoerced statement, although it was obtained in violation of *Miranda*, outweighed the deterrent effect of excluding it. The Court first began to describe *Miranda* as prophylactic in *Tucker*, 417 U.S. 433. See infra notes 38-41 and accompanying text.
prosecution may use statements taken in violation of *Miranda* to impeach a defendant who chooses to take the stand in his own defense if the statements are “voluntary,” but may not use them in its case in chief.\(^{35}\)

The Court distinguished between a statement that does not satisfy the standards of *Miranda* and a statement that is not voluntary under a traditional due process analysis.\(^{36}\) In balancing the fifth amendment rights of the defendant against the interests of law enforcement, the *Harris* majority focused on *Miranda*’s rationale of deterring police misconduct. It reasoned that keeping the illegal confession out of the prosecution’s case in chief would provide adequate incentive for police to comply with *Miranda*.\(^{37}\) At the same time, the probative value of the evidence for impeachment outweighed the likelihood that police would disregard *Miranda* in hopes that any resulting confession would be admitted for impeachment.\(^{38}\)

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The federal rule regarding the use of a *Miranda*-flawed confession for impeachment purposes is inapplicable with regard to a coerced confession. The latter presents the risk of utilizing a completely false statement against an innocent person, whereas the former involves only a prophylactic rule unrelated to the issue of trustworthiness.

36. *Harris*, 401 U.S. at 224 (“Petitioner makes no claim that the statements made to police were coerced or involuntary.”); see supra note 33 and accompanying text (containing examples of cases where confessions were held involuntary).

Professors Dershowitz and Ely claim that Chief Justice Burger mischaracterized the record in *Harris*. They argue that the *Harris* defendant claimed throughout the litigation that his statement was involuntary. The New York state courts had not determined whether the confession was voluntary because they had erroneously concluded that any inconsistent statement, whether actually coerced or “only” the result of a *Miranda* violation, could be used to impeach the defendant’s credibility. At oral argument, the defendant’s attorney stated that the defendant was a twenty-three year old addict with a tenth-grade education who, at the time of his confession, was suffering from withdrawal and recovering from a car accident in which he had suffered a concussion. According to Dershowitz and Ely, the *Harris* Court ignored this evidence. Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1201-04 (1971).

37. As Chief Justice Burger wrote:

The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner’s credibility, and the benefits of this process should not be lost because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

*Harris*, 401 U.S. at 225.

38. *Id.* at 225. Under *Harris*, while the trial court can admit an illegally obtained confession for impeachment, it must instruct jurors to use the confession solely to ascertain the defendant’s credibility and not as substantive evidence of guilt. *Id.* at 223. The dissent argued that *Miranda* limited all uses of an illegal statement. Otherwise, a defendant who makes inculpatory statements without the benefit of *Miranda* warnings would have to forego his right to take the stand in his own defense or risk that the jury would hear his confession. The defendant should be free to make his case without the government introducing illegally obtained evidence as rebuttal. *Id.* at 229-30 (Brennan, J., dissenting).
According to the Court, "[t]he shield provided by *Miranda* cannot be perverted [by the defendant] into a license to use perjury ...."

The Court has extended this balancing test to a number of situations. For instance, in *Michigan v. Tucker*, the police violated *Miranda* by failing to inform the defendant of his right to have an attorney appointed before they questioned him. The defendant's resulting statements led the police to a witness whose testimony incriminated the defendant. Nevertheless, the Court upheld a conviction that was based in part upon testimony from that witness. Reasoning that *Miranda* was prophylactic and determining that the defendant's statements were voluntary in traditional terms, the Court refused to apply the "fruit of the poisonous tree" doctrine, which would have required it to exclude information obtained in violation of *Miranda* for all purposes. As it had in *Harris*, the Court balanced the interests protected by excluding the evidence against the interests served by making the evidence available to the jury.

In another context, the Court in *New York v. Quarles* recognized a "public safety" exception to *Miranda*. It determined that the police need not give *Miranda* warnings to a suspect if they need immediate information in the interests of public safety. In *Quarles*, three police officers cornered the defendant in a supermarket after a woman told the officers that he had raped her at gunpoint. After searching the defendant and finding no gun, the officers concluded that he must have left the gun in the store. Without advising him of his *Miranda* rights, one officer asked him where the gun was, and the defendant told the officer. The Court held that the defendant's statement, along with the gun, were admissible in the defendant's trial. The Court determined that because the defendant's statement did not result from actual coercion, the fifth amendment did not require exclusion.

39. Id. at 226.
41. Id. at 436-37.
42. See *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (holding that evidence taken from a third party as a result of statements made by the defendant at the time of his unlawful arrest were fruits of that unlawful police activity and must be excluded). The *Tucker* Court distinguished *Wong Sun* because that case involved a fourth amendment violation, which, unlike a *Miranda* violation, was itself a violation of the Constitution. *Tucker*, 417 U.S. at 445-46.
43. *Tucker*, 417 U.S. at 444 ("The prophylactic *Miranda* warnings are not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.").
45. Id. at 657 ("We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.").
46. Id. at 652.
47. Id. at 659-60.
48. Id. at 654.
Quarles Court reasoned that if the officer had read the defendant his rights, the cost to society would have outweighed the defendant's interest in receiving the warnings. Had the defendant been reminded of his right to silence, he may not have made a statement and the police may not have located the gun as quickly.\textsuperscript{49}

B. How Well a Suspect Must Understand His Rights Under the Current Miranda Doctrine

The Supreme Court has continued to apply this balancing analysis in recent cases involving a suspect's ability to understand his \textit{Miranda} rights. In so doing, the Court has sacrificed \textit{Miranda}'s concern for guarding individual dignity and dispelling police coercion in exchange for what it perceives to be enhanced law enforcement.

\textit{Miranda} requires the prosecution to prove that a defendant knowingly and intelligently waived both his right to silence and his right to counsel before any custodial confession will be admitted.\textsuperscript{50} In recent decisions, the Court has continued to assert that the prosecution must overcome a "heavy burden" before it can demonstrate that a defendant has waived his rights under \textit{Miranda}:

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the \textit{Miranda} rights have been waived.\textsuperscript{51}

Despite these assertions, however, recent decisions demonstrate that all the Court requires is that police tell the suspect of his rights in objectively understandable language before questioning; the suspect need not be given all of the information that would help him fully understand and evaluate his rights.

\textsuperscript{49} \textit{Id.} at 657.

\textsuperscript{50} \textit{Miranda}, 384 U.S. at 475 (citation omitted) ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."); see \textit{Dix}, supra note 29, at 237 (observing that the \textit{Miranda} Court did not expect suspects to waive their rights very frequently, but rather expected them to request the presence of counsel most of the time).

An example of the Supreme Court’s willingness to sacrifice Miranda’s requirement of a “knowing and intelligent waiver” appeared in a 1985 case, Oregon v. Elstad. The Supreme Court in that case held that a suspect need not appreciate all of the consequences of a waiver in order to “knowingly” waive his Miranda rights. In Elstad, the police went to the defendant’s home and elicited incriminating statements without first informing him of his Miranda rights. They then took the defendant to the station, read him his rights and obtained a written confession. The Court held that, while the first incriminating statement violated Miranda and could not be admitted, the second statement complied with Miranda even though the defendant claimed that when he made that statement he did not know that his first statement could not be used against him. The Court argued that inferring that the defendant made the second statement because he believed he had already incriminated himself with the first confession is “speculative and attenuated at best.” According to the Court, the administration of Miranda warnings at the police station cured the condition that made the unwarned confession inadmissible. "Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." The Court presumed that a criminal suspect will understand that a prior un-Mirandized confession does not compel him to incriminate himself and formally confess to the crime.

The Elstad dissent argued that a suspect who does not understand that prior admissions cannot be used against him may make the same admission after being given Miranda warnings because he thinks that his situation is hopeless, since the “cat” is already “out of the bag.” The majority

53. Id. at 316 (“This Court has never embraced the theory that a defendant’s ignorance of the full consequences of his decisions vitiates their voluntanness.”).
54. Id. at 301.
55. Id. at 301-02.
56. The prosecution did not dispute that those statements were inadmissible. The state stipulated that the defendant was in custody when he made the first statement, although the police had not told him that he was under arrest. Id. at 302. However, Miranda does not apply when a suspect meets with police officers voluntarily. See supra note 18. The Court in Elstad implied that it might not have found the first statement to be a violation of Miranda if the state had not conceded the fact of custody. Elstad, 470 U.S. at 315-16.
57. Elstad, 470 U.S. at 316, 318.
58. Id. at 313-14.
59. Id. at 310-11 (citation omitted) ("[A] careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect’s choice whether to exercise his privilege to remain silent should ordinarily be viewed as an ‘act of free will.’").
60. Id. at 308.
61. Id. at 332 (Brennan, J., dissenting); see also id. at 331 (discussing similar concepts). Commentators have argued that the Elstad decision will encourage police to stretch Miranda further than the holding in that case actually permits. The decision did not authorize police to exploit a suspect’s ignorance and use his first confession as a means of securing a second.
reasoned, however, that society’s interest in efficient law enforcement outweighs any interest in providing immunity to suspects for second confessions. Nor did the *Elstad* majority consider it practical to require police to warn a suspect that his prior statement could not be used against him in order to remove the taint of a prior unwarned confession. According to the Court, “[p]olice officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when ‘custody’ begins or whether a given unwarned statement will ultimately be held admissible.” The majority underscored *Miranda’s* requirement that police explicitly inform a suspect of his right to have counsel present during interrogation to advise him on such tricky matters.

Similarly, in *North Carolina v. Butler*, the Court upheld the admission of a confession obtained from a defendant who refused to sign a written waiver, but still spoke to police. Refusing to rule that *Miranda* requires per se that a suspect expressly waive his rights, the Court held that a criminal suspect can imply waiver through his actions and words. Because the defendant was “adequately and effectively apprised of his rights,” the Court presumed that he understood that he did not have to speak with police. Therefore, because he did speak to the police, the Court concluded that he had voluntarily waived his rights.

The majority's rationale in *Butler* implies that it will not require the criminal justice system to forego reliable confessions obtained from suspects who understand their rights and desire to speak to police, even though they may be unwilling to sign a written waiver. But some police officers will probably interpret the decision to mean they can do just that. “At a minimum, decisions such as *Elstad* convey the message that police should not take *Miranda* too seriously and that the Court will stretch to uphold admissibility of confessions.”

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63. Id. at 316.
64. Id. (citing Tanner v. Vincent, 541 F.2d 932, 936 (2d Cir. 1976), *cert. denied*, 429 U.S. 1065 (1977)).
65. Id.
67. Id. at 373.
68. Id. at 374; see also Connecticut v. Barrett, 479 U.S. 523 (1987). The *Barrett* Court refused to suppress a confession from a defendant who refused to sign a written confession without his attorney present but clearly agreed to speak with the police. According to the Court, since the defendant had indicated that he understood his rights, his waiver with regard to the oral statement was valid, although the prosecution could not have used a written statement against him.
69. *Butler*, 441 U.S. at 373 (“The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.”).
70. The *Butler* dissenters argued that for *Miranda* to be effective suspects must explicitly waive their *Miranda* rights for their statements to be admissible. Id. at 378 (Brennan, J.,...
In *Colorado v. Spring,* the Court held that a suspect does not have to be aware of all of the subjects that the interrogation will cover before he can intelligently waive his right not to incriminate himself. In that case, police arrested the defendant, whom they suspected was involved in a murder, for illegal transportation of firearms. When the police read the defendant his *Miranda* rights, they did not inform him that they would question him about the murder as well as about the firearms offense. After the defendant waived his *Miranda* rights, the police began to question him about the firearms offense, but then worked in questions about the murder. The defendant eventually implicated himself in the murder and at a later time confessed. The defendant claimed that he did not voluntarily waive his right to silence or to an attorney with regard to questions pertaining to the murder. Therefore, he argued, those statements were obtained in violation of his fifth amendment right against self-incrimination.

However, the *Spring* Court held that the defendant's waiver was knowing and intelligent because the defendant understood from his *Miranda* warnings that he had the right not to speak to the officer, the right to have counsel present and the right to stop talking at any time. According to the majority, "any number of factors could affect a suspect's decision to waive his *Miranda* rights," and police should not be required to "supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." (dissenting). According to the dissent, because the defendant refused to sign the written waiver, it was not clear whether he understood that speaking with police constituted a waiver of his right to silence. The dissent pointed out that there was conflicting evidence as to whether anyone read the defendant his rights or whether he was merely presented with the written form. It was also not clear whether the defendant knew how to read. Therefore, "if Butler did not have his rights read to him, and could not read them himself, there could be no basis upon which to conclude that he knowingly waived them." According to Justice Brennan, "presents a clear example of the need for an express waiver requirement."  

72. *Id.* at 577; see also *Wyrick v. Fields,* 459 U.S. 42 (1982) (When the defendant waived his *Miranda* rights with regard to taking a lie detector test, that waiver encompassed questioning after the test, even though the defendant may not have realized that he had waived his rights with regard to such questioning.).
73. *Spring,* 479 U.S. at 566. The defendant did not claim that he misunderstood why he was being questioned at the time that he actually confessed to the murder, but that the confession should have been suppressed because it was tainted by the incriminating statements he made about the murder during the original questioning. Because the Court found the original statements admissible, it did not need to determine whether the later confession was "tainted." "A confession cannot be 'fruit of the poisonous tree' if the tree itself is not poisonous." *Id.* at 571-72.
74. *Id.* at 574-75.
75. *Id.* at 577 n.9.
76. *Id.* at 576-77. The dissent argued that the statements of the defendant incriminating himself in the murder should have been excluded as a violation of *Miranda.* Justice Marshall observed:

[A] suspect's decision to waive this privilege will necessarily be influenced by his
The Supreme Court's willingness to find that suspects have knowingly and intelligently waived their fifth amendment rights when they do not necessarily understand those rights seems to reflect an attitude on the part of a majority of the Court that the fifth amendment does not require police to discourage suspects from making incriminating statements. This attitude is apparent in a recent case which did not concern whether a suspect understood his *Miranda* rights but rather whether police must inform the suspect of external factors that may influence his decision of whether to request counsel. In *Moran v. Burbine*, when the police read the defendant his rights and asked him to sign a waiver, they neglected to inform him that his attorney had phoned and wanted to talk to him before questioning. The defendant agreed to speak to police and did not indicate in any way that he wanted an attorney present. The Court concluded that because the police followed the procedures outlined in *Miranda*, the defendant received all of the information constitutionally required. The *Burbine* majority conceded that requiring police to inform a suspect of her attorney's efforts to reach her would dispel some of the coercion inherent in the custodial atmosphere and probably would provide useful information to the suspect. According to the Court, however, this requirement would place too great a burden on law enforcement by making it more difficult for police to secure admissions of guilt.

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awarement of the scope and seriousness of the matters under investigation. Additional questioning about entirely separate and more serious suspicions of criminal activity can take unfair advantage of the suspect's psychological state, as the unexpected questions cause the compulsive pressures suddenly to reappear.

*Id.* at 578, 581.

77. *475 U.S. 412.*

78. *Id.* at 416-17.

79. *Id.* at 417-18. The defendant was arrested for breaking and entering, and was questioned by police in Cranston, Rhode Island. The police connected the defendant with a murder that had occurred several months earlier in Providence and informed the Providence police, who went to the Cranston police station to investigate. Meanwhile, the defendant's sister, in response to the defendant's arrest for breaking and entering, called the public defenders' office to secure representation for her brother. A public defender called the police station and requested that police not question the defendant until she arrived. A Cranston detective told her that they were through with the defendant for the night, when in fact, an hour later, the Providence police began questioning the defendant about the murder. *Id.* at 416-17. Evidence from the trial court suggested that the officer who spoke to the defendant's attorney was aware that the Providence police were still investigating the defendant. *See id.* at 446 (Stevens, J., dissenting).

80. *Id.* at 422.

Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

*Id.* at 422-23.

81. *Id.* at 426-27.

82. *Id.*
The *Burbine* majority refused to adopt a rule that would invalidate a suspect's waiver of *Miranda* rights when police failed to inform her of attempts by her attorney to reach her. In doing so, the Court placed the government's interest in efficient law enforcement above the suspect's interest in being able to waive her rights knowingly and intelligently.\(^83\) First, the Court determined that such a rule would make *Miranda* warnings more difficult to administer. Police would have difficulty knowing "[t]o what extent [they should] be held accountable for knowing that the accused has counsel."\(^84\) The Court also argued that requiring police to give this additional information to suspects would disrupt the "subtle balance" of the *Miranda* decision.\(^85\) While this rule would handicap investigatory proceedings by making suspects less likely to speak to police, it would add only marginally to dispelling coercion.\(^86\)

Justice Stevens dissented, arguing that the police had deceived the suspect in failing to warn him that his attorney had attempted to reach him.\(^87\) According to Stevens, the officers did not want the suspect to know that an attorney was trying to contact him, because with that information he would have been more reluctant to confess, thus making a conviction for a brutal murder more difficult to secure. The dissent pointed out the context of the call of the defendant's lawyer to the police station. "Two Police Departments were on the verge of resolving a highly publicized, hauntingly brutal homicide in which . . . the police were aware that counsel's advice to remain silent might be an obstacle to obtaining a confession."\(^88\) Stevens attacked the Court's balancing approach as "profoundly misguided," noting that every procedural safeguard has the "cost" of making convictions more difficult to secure.\(^89\)

### III. THE *Duckworth* Decision

#### A. *The "If and When You Go to Court" Language*

Previous cases have upheld admission of confessions when police gave the suspect the required warnings under *Miranda*, but failed to inform the

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\(^83\) *Id.* at 425 ("While such a rule might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption.").

\(^84\) *Id.*

\(^85\) According to the majority, *Miranda* represented a compromise between the usefulness of confessions in law enforcement and the inherent coerciveness of the interrogation process. While *Miranda* refused to entirely favor the interest of defendants by requiring that attorneys be present during every interrogation, it did give defendants "the power to exert some control over the course of the interrogation." *Id.* at 426.

\(^86\) *Id.* at 426-27.

\(^87\) *Id.* at 452 (Stevens, J., dissenting).

\(^88\) *Id.* at 450.

\(^89\) *Id.* at 457.
suspect completely about his rights or to give him information that would bear on his decision of how to exercise those rights.90 Duckworth v Eagan91 upheld the admission of a confession when the suspect arguably did not understand the warnings themselves. In Duckworth, the Court upheld warnings that may not have clearly informed the defendant of his right to have an attorney appointed prior to questioning if he could not afford to retain one.92 The defendant had confessed after police told him that if he were indigent he could have an attorney appointed "if and when [he went] to court."93

According to Chief Justice Rehnquist, writing for a five-member majority, "the initial warnings given to respondent touched all of the bases required by Miranda."94 Telling an indigent suspect that he could have a lawyer appointed "if and when [he goes] to court" adequately informed him of his right to have an attorney appointed before questioning because it

90. See supra notes 52-89 and accompanying text.
92. Id. at 2880.
93. Id. at 2877; see supra notes 10-13 and accompanying text. The facts of Duckworth are more complicated than this holding would suggest. The defendant originally brought Chicago police to the victim, who had been stabbed nine times. When the victim saw the defendant, she said, "[w]hy did you stab me?" The defendant volunteered to these officers that he had been with the woman earlier, that they had been attacked and that several men abducted her. The next day the case was turned over to Indiana police to whom the defendant volunteered the same story. Then the defendant received the Miranda warnings in question. He signed the waiver and repeated the same story. The next morning the defendant was given a new set of warnings whose adequacy was not an issue in the case. After signing the waiver, the defendant confessed to stabbing the woman. Id. at 2876-78.

When the defendant made his first statement, in which he denied committing the crime but admitted being with the woman earlier, warnings were not required because he was not in custody. See Oregon v. Mathiason, 429 U.S. 492 (1977). The defendant did not alter this story in the statement taken immediately after the warnings which he contended were misleading, and so the admission of that statement probably was not an issue for the defense. The confession whose admission occurred after Miranda warnings which were not tainted by the "if and when you go to court" language. Therefore, the defendant argued that the first misleading warning led him to believe that because he was indigent he could not secure counsel during interrogation. "[T]he second warning 'did not explicitly correct this misinformation,'" Duckworth, 109 S. Ct. at 2878 (quoting Eagan v. Duckworth, 843 F.2d 1554, 1558 (7th Cir. 1988)).

Therefore, even if the Court had determined that the "if and when you go to court" language of Eagan's first warning was defective, the majority may still have upheld his later confession had they determined that the second set of warnings cured the defects present in the first. Cf. Oregon v. Elstad, 470 U.S. 298, 309 (1985) (holding that a second "Mirandized" statement was not tainted by an earlier admission elicited in violation of Miranda). For a discussion of Elstad, see supra notes 52-65 and accompanying text.

94. Duckworth, 109 S. Ct. at 2880; see also California v. Prysock, 453 U.S. 355 (1981). The Court in Prysock upheld warnings that did not mimic the language in the Miranda decision, but also said that a suspect's right to counsel cannot be linked to a future event. Id. at 360. The Duckworth Court distinguished Prysock on the grounds that although the warnings in Duckworth linked the availability of counsel to a future event, they clearly advised the defendant of his right to counsel before interrogation. Duckworth, 109 S. Ct. at 2880-81. See supra note 8 and accompanying text for a description of the facts and holding of Prysock.
accurately portrayed the procedures for appointing counsel in Indiana, where
the interrogations took place.95 "Under Indiana law, counsel is appointed
at the defendant's initial appearance in court and formal charges must be
filed at or before that hearing." Therefore, if an indigent suspect invokes
his right to counsel, police must cease questioning until after his initial
court appearance.96 Miranda does not require that lawyers be available in
the station house on call.98 Consequently, the Court reasoned that the "if
and when you go to court" language simply anticipated the suspect's
questions about when his lawyer will be appointed.99

The Court of Appeals for the Seventh Circuit had agreed with the
defendant, who argued that the "if and when you go to court" language
was misleading because it "suggested that 'only those accused who can
afford an attorney have the right to have one present before answering any
questions' . . . ."100 The Seventh Circuit relied on its 1972 decision in United
States ex rel. Williams v. Twomey,101 which had struck down warnings
substantially similar to those given to the defendant in Duckworth. In
Twomey, the Court of Appeals had reasoned:

"[T]he statement that no lawyer can be provided at the moment and
can only be obtained if and when the accused reaches court substantially
restricts the absolute right to counsel previously stated; it conveys the
contradictory alternative message that an indigent is first entitled to
counsel upon an appearance in court at some unknown, future time.
The entire warning is therefore, at best, misleading and confusing and,

95. Duckworth, 109 S. Ct. at 2880.
96. Id. (citations omitted).
97. Id. ("If the police cannot provide appointed counsel, Miranda requires only that the
police not question a suspect unless he waives his right to counsel."); see Edwards v. Arizona,
451 U.S. 477, 484-85 (1981) (Once the accused has "expressed his desire to deal with the police
only through counsel, [he] is not subject to further interrogation by the authorities until
counsel has been made available to him, unless the accused himself initiates further commu-
nication, exchanges, or conversations with the police."); Miranda v. Arizona, 384 U.S. 436,
474 (1966) (If the accused invokes his right to counsel, the interrogation must cease until an
attorney is present.).
98. Miranda, 384 U.S. at 474 ("This does not mean, as some have suggested, that each
police station must have a 'station house lawyer' present at all times to advise prisoners."). cited
with approval in Duckworth, 109 S. Ct. at 2880.
99. Id. Compare United States v. Harrell, 894 F.2d 120, 125 (5th Cir. 1990) (The Court
of Appeals held that a statement to the defendant that if he could not afford an attorney,
one would be furnished "if the matter went to trial" was not constitutionally defective. In
admitting the statement, the court did not rely exclusively on this ground but also found that
the statement was not custodial.) with State v. Bittick, No. WD 41,387 (Mo. App. May 29,
1990) (LEXIS, States library, Mo file) (The court distinguished Duckworth and held a confession
invalid when an officer told the defendant, "if you want an attorney at this time it would be
your responsibility to contact one." Concluding that the officer's statement "misadvised and
misled" the defendant, the court found that the defendant could not have knowingly and
intelligently waived his right to the immediate assistance of counsel.).
100. Duckworth, 109 S. Ct. at 2880 (citing Eagan v. Duckworth, 843 F.2d 1554, 1557 (7th
Cir. 1988)).
101. 467 F.2d 1248 (7th Cir. 1972).
at worst, constitutes a subtle temptation to the unsophisticated, indigent accused to forego the right to counsel at this critical moment."102

Like the defendant in Twomey, Eagan claimed that he was confused about his rights because the warning that police read to him did not inform him clearly and unequivocally of his right to have counsel appointed before any interrogation.103

Justice Marshall, writing for the dissent in Duckworth, agreed with the Seventh Circuit. He emphasized that Miranda specifically mentioned the importance of conveying to an indigent suspect that he has the right to have counsel present "before and during interrogation."104 Marshall argued that "recipients of police warnings are often frightened suspects unlettered in the law, not lawyers or judges or others schooled in interpreting legal or semantic nuance."105 Therefore, while the warnings in Duckworth may technically inform a suspect of his rights, many suspects would not be able to analyze the warnings as the majority had, and would waive their right to an attorney without understanding that a request to have counsel appointed would end questioning until counsel arrived. "The majority thus refuses to recognize that '[t]he warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has the right to have counsel present.'"106 Duckworth seems to follow from

102. United States ex rel. Williams v. Twomey, 467 F.2d 1248, 1250 (7th Cir. 1972) (this language was cited in Eagan v. Duckworth, 843 F.2d 1554, 1557 (7th Cir. 1988)); see also Gilpin v. United States, 415 F.2d 638, 641 (5th Cir. 1969) (a warning that used the language "if and when you go to court" failed to convey to the defendant that he was entitled to appointment of an attorney "here and now" in light of the fact that the defendant had only a sixth-grade education and had been drinking heavily the night before). But see Coyote v. United States, 380 F.2d 305, 307 (10th Cir. 1967) (upholding the warning, "I can talk to a lawyer or anyone before saying anything, and the judge will get me a lawyer if I am broke"), cert. denied, 389 U.S. 992 (1967).

The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of his rights.

It is always open to an accused to subjectively deny that he understood the precautionary warning [It is for the court to objectively determine whether in the circumstances of the case the words used were sufficient to convey the required warning.]

Id. at 308.

103. Id. at 2887.

104. Id. (quoting Miranda, 384 U.S. at 471).

105. Id. (quoting Miranda, 384 U.S. at 473); see also Rosenberg & Rosenberg, supra note 61, at 88:

The "if and when" caveat approved in Duckworth undermines the prior warning given a suspect that an attorney can be present during interrogation and makes it appear either that the interrogation will be delayed or that the defendant will
previous decisions where the Court, while continuing to bow toward *Miranda*, has not required that a suspect understand his rights beyond the narrow boundaries of the *Miranda* warnings themselves.¹⁰⁷

### B. The Effect of the Duckworth Decision

In prior decisions regarding the admissibility of confessions elicited after *Miranda*-type warnings, the Court engaged in a balancing analysis. On one side of the balance, the Court placed the possibility that a defendant's statement was coerced because she might be confused about her rights. On the other side of the balance, the Court placed the probative value of confessions and the extent to which requiring the defendant to be fully informed would hamper law enforcement by preventing police from obtaining confessions.¹⁰⁸ In *Duckworth*, however, the Court did not engage in a balancing analysis to arrive at its conclusion that the “if and when you go

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¹⁰⁷. See supra notes 34-89 and accompanying text for treatment of these prior cases.

¹⁰⁸. For instance, the Court in *Elstad* stated that police officers would have difficulty administering *Miranda* warnings if they had to determine whether previous statements violated *Miranda*. According to the Court, this outweighed the “speculative” possibility that the suspect would feel compelled, because of his earlier un-Mirandized statement, to confess. *Elstad*, 470 U.S. at 312-14; see supra notes 52-65 and accompanying text (discussing *Elstad*).

In *Burbine*, the balancing was similar. The Court found that adopting the rule urged by the defendant would hamper the ability of police to obtain confessions while not significantly decreasing coercion. “This minimal benefit . . . would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt.” *Moran v. Burbine*, 475 U.S. 412, 427 (1986). In addition, a rule that requires police to inform defendants of their attorneys' attempts to reach them would be difficult for law enforcement to administer because police would not know how much information they would need to provide defendants in addition to their *Miranda* rights. *Id.* at 425; see supra notes 77-89 and accompanying text (discussing *Burbine*).

In *North Carolina v. Butler*, 441 U.S. 369 (1979), the Court implicitly balanced the possibility that a court will infer a waiver from a suspect who does not understand his rights against the interests of police in obtaining confessions from suspects who understand their rights and are willing to talk, but who may hesitate to sign a written waiver. See supra notes 66-70 and accompanying text (discussing *Butler*).

In *Spring*, the Court was the least explicit about its balancing approach. However, the Court went to great lengths to explain that the defendant understood that he did not have to answer any questions that might incriminate him. The Court also stated, “‘[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.’” *Colorado v. Spring*, 479 U.S. 564, 576-77 (1987) (quoting *Burbine*, 475 U.S. at 422). In addition, the Court noted that extending *Miranda* to require police to inform the suspect of everything that would affect his decision about whether to speak would make administration of *Miranda* warnings more difficult for police. *Id.* at 577 n.9; see supra notes 71-76 and accompanying text (discussing *Spring*).
to court” warnings “reasonably ‘convey[y] to [a suspect] his rights as required by Miranda.” 19

It is possible that the Court did not engage in a balancing analysis in Duckworth because it disbelieved the defendant’s claim that he was confused about his right to counsel, and therefore found no conflict with Miranda. This is an improbable ground for the decision, however, because it is likely the Court would have realized that at least some defendants would be confused by the “if and when you go to court” language. Also, the Court did not analyze whether Mr. Eagan himself was in fact confused.

Because many suspects will not understand clearly their right to appointed counsel, the Duckworth Court has approved a tactic which may increase coercive pressure in the custodial setting by allowing police to include in Miranda warnings the “if and when you go to court” language. Yet the Court was silent about what benefits law enforcement would gain from using this tactic. 110 The Court’s reason for allowing this type of police behavior was probably similar to its reason in Burbine—to make it easier for police to secure confessions.

Confessions provide extremely powerful evidence against a criminal defendant. 111 This gives police officers an incentive to do whatever they can, within the law, to obtain a confession from a suspect. The less a suspect understands about his rights, the more likely he will be to confess, or to make an inculpatory statement. 112 Therefore, the police department in

110. The Court in Duckworth did say that sometimes officers in the field would need to administer Miranda warnings to a suspect and would not have a Miranda card handy. Id. at 2878-80. The Court probably did not attach much weight to this reasoning. First, it should not be difficult for a police officer in the field to read Miranda warnings correctly. Kamisar, Duckworth v. Eagen: A Little-Noticed Miranda Case that May Cause Much Mischief, 25 CRIM. L. BULL. 550, 556-57 (1989) (“How much effort does it take to memorize the warnings or, if one’s memory is weak, to carry a Miranda card? The Chief Justice writes as if each of the four warnings is inscribed on a separate heavy stone tablet and a given police department only has one set.”). Second, the warnings that the police actually read to the Duckworth defendant came from a pre-printed waiver form at the police station. Duckworth, 109 S. Ct. at 2877. The state, therefore, could not argue that the arresting officer was in a bind and had to improvise the Miranda warnings that he read to the suspect.
111. “Triers of fact accord confessions such heavy weight in their determinations that ‘the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.’” Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (quoting MCCORMICK ON EVIDENCE 316 (2d ed. 1972)); Dix, supra note 29, at 254 ( “[C]onfession law generally assumes that confessions are unusually reliable evidence of a defendant’s guilt because these statements are so contrary to the defendant’s interest that they would not have been made unless the defendant honestly believed them to be accurate.”).
Duckworth probably considered that if it did not explicitly notify indigent suspects of their right to have counsel appointed before any questioning, fewer indigent suspects would request counsel and the department would obtain more confessions.\textsuperscript{113}

The Duckworth Court seems to indicate that it is willing to allow police to administer weaker—even confusing—Miranda warnings solely to decrease the likelihood that a suspect will exercise his right to an attorney or his right to silence.\textsuperscript{114} However, the Burbine decision, as well as other decisions discussed in this Note, emphasized repeatedly that the defendants' confessions were admissible because even if the police had not provided the defendants with every piece of useful information, they had clearly informed them of their right to silence and their right to counsel. The Duckworth Court, on the other hand, could not make that claim because the defendant in that case was not clearly informed of his right to have counsel appointed before questioning.

The Court, it seems, was reluctant to make its balancing analysis express because it did not want to declare explicitly that the failure of police to give the defendant a clear statement of his rights was justified by the interests of law enforcement and the prophylactic nature of Miranda. Had the Court made this balance explicit, it would have come very close to overruling Miranda altogether.\textsuperscript{115}

emphatically that the suspect asserted his rights and never said a word about the case?

\textit{Id.}, see also \textit{Criminal Interrogation}, supra note 15. According to the authors, the typical Miranda warnings include advising the suspect that he "can decide at any time to exercise these rights and not answer any questions or make any statements." Although Miranda requires the officer to discontinue the interrogation once the suspect invokes his rights, the authors express their belief that Miranda does not actually require the interrogator to tell this to the suspect, and they advise interrogators to leave it out of the warning. \textit{Id.} at 279; see also Brown v. State, 565 So. 2d 304 (Fla. 1990) (holding that the police need not inform a suspect that he can cease answering questions at any time for the warnings to be constitutionally sufficient); State v. Fecteau, 568 A.2d 1187 (N.H. 1990) (same).

Some commentators argue that there is nothing wrong with securing a confession by taking advantage of a suspect's lack of sophistication or knowledge. See Grano, supra note 26, at 677 (arguing that seeking the truth is more important than seeking equality in interrogation).

113. Kamisar noted: "The best explanation for the failure of the police to abandon their version of the warnings is the belief (and, I think, a well-founded one) that their formulation tends to confuse unsophisticated indigent suspects and to induce them to forgo the right to counsel at the critical moment." Kamisar, \textit{supra} note 112, at 26, col. 3.

114. In her concurring opinion, Justice O'Connor showed her disdain for invalidating confessions that violate Miranda. She argued that Stone v. Powell, 429 U.S. 874 (1976), should be extended to Miranda cases so that Miranda claims could not be argued on habeas corpus because the interests in encouraging police to properly administer the Miranda warnings are not weighty enough to warrant overturning a state conviction. \textit{Duckworth}, 109 S. Ct. at 2884 (O'Connor, J., concurring).

115. A satisfactory discussion of the pros and cons of overruling Miranda is beyond the scope of this Note and has been provided, at length, by other commentators. See Schulhofer, \textit{supra} note 20; Grano, \textit{supra} note 26. For an exhaustive list of commentaries on the subject, see Dix, \textit{supra} note 29, at 232 n.1.
Rather than overrule *Miranda, Duckworth* instead left *Miranda* with some vitality. Lower courts, though often reluctant to reverse a conviction based on a violation of *Miranda*, recognize that law enforcement officers at a minimum must inform custodial suspects before interrogation of their core rights under the fifth amendment’s self-incrimination clause. As the Court of Appeals for the Third Circuit has observed, “unless *Miranda* is over-turned, something essentially equivalent to the familiar *Miranda* recitation must be conveyed to the suspect.”116 And in the vast majority of police interrogations, suspects do receive *Miranda* warnings. Of course, the value of these warnings for defendants is at best unclear if, as this Note contends, after *Duckworth* a suspect need not understand his *Miranda* warnings to effectively waive his rights.

One reason the Court has refused to overrule *Miranda* may be that even when *Miranda* warnings do not convey every aspect of a suspect’s fifth amendment right not to incriminate herself, they still provide some benefit to a suspect who is in custody. The warnings remind the suspect that she is in a society where her constitutional rights will be protected. By itself this can reduce some of the compulsion inherent in the custodial setting.117 Similarly, the warnings put a suspect on notice of the seriousness of her situation, which may make her more careful about the statements that she makes.118 In addition, informing a suspect that she does not have to talk to police and may consult with an attorney conveys substantively useful information to that suspect, even if many do not take advantage of their rights.119

116. United States v. Cruz, 910 F.2d 1072, 1079 n.5 (3d Cir. 1990) (upholding a warning which, in addition to the regular *Miranda* warnings, informed the suspect that he had the right to answer questions without a lawyer). Although the court in *Cruz* did not “endorse” that statement as part of the usual *Miranda* recitation, the court determined that it did not “dilute[] the substance of the warnings.” *Id.* at 1079.

117. *Miranda*, 384 U.S. at 468 (“the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it”); Schulhofer, *supra* note 20, at 447 (“Even if [a] sophisticated suspect knows his rights he needs to know [that] the police know his rights.”) (emphasis in original).

118. *Miranda*, 384 U.S. at 469 (“this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest”). In one book, the authors recommend that, in order to encourage a suspect to confess, officers should interrogate her in a room that does not remind her of their law enforcement objective. *Criminal Interrogation, supra* note 15, at 29. “[T]he less the surroundings suggest a police detention facility, the less difficult it will be for the suspect who is really guilty to implicate himself.” *Id.*

119. For example, the Colorado Supreme Court recently required suppression of a defendant’s statement when he received no *Miranda* warnings at all. People v. Trujillo, 784 P.2d 788 (Colo. 1990). Although the defendant was not officially put under arrest, an officer questioned him for one-and-one-half hours about an assault and did not tell him that he was free to leave. The court believed the defendant when he testified that he thought he had to answer the officer’s questions, and held that the statements violated *Miranda*, even though it could have concluded the defendant was not in custody and that *Miranda* warnings were
Another reason the Court may have for refusing to overrule *Miranda* is that *Miranda* warnings eliminate the need for case-by-case inquiries into the voluntariness of defendants' admissions. Although a defendant can always argue that police conduct during his interrogation was so egregious that his confession was not the product of his free will, the Court has developed an extremely high standard for invalidating confessions on that ground. When police administer *Miranda* warnings, they wave a magic wand over the ensuing confession, or at least trigger a strong presumption that any resulting confession has been voluntarily and freely given. As the cases discussed in this Note seem to indicate, if the defendant has been read "something essentially equivalent to the familiar *Miranda* recitation" before making an incriminating statement, courts can usually admit the statement without inquiring into whether that statement resulted from compulsion. These reasons may be motivating the Court to continue upholding *Miranda* while at the same time limiting it so that it does not necessarily serve all of the interests that the original *Miranda* Court sought to protect.

unnecessary. *Id.* at 790, 792. Had the officer in *Trujillo* informed the defendant of his right to silence and his right to consult with an attorney, the defendant would have known that he did not have to speak to the officer.

120. "A principal objective of [*Miranda*] was to establish safeguards that would liberate courts insofar as possible from the difficult and troublesome necessity of adjudicating in each case whether coercive influences, psychological or physical, had been employed to secure admissions or confessions." People v. May, 44 Cal. 3d 309, 328, 748 P.2d 307, 319, 243 Cal. Rptr. 369, 381 (1988) (Mosk, J., dissenting) (quoting People v. Fioritto, 68 Cal. 2d 714, 717, 441 P.2d 625, 626, 68 Cal. Rptr. 817, 818 (1968).

121. Even if a suspect has been given *Miranda* warnings, there are limits to what an interrogator can do to obtain a confession. See supra note 33 and accompanying text.

122. *Cruz*, 910 F.2d at 1079 n.5.

123. A 1986 Supreme Court decision illustrates this point. In *Connelly*, 479 U.S. 157, the Court held that if officers administer adequate *Miranda* warnings to a suspect and do not physically coerce him, the suspect does not have to be thinking rationally when he waves his rights. In *Connelly*, the defendant approached a police officer and said he wanted to confess to a murder. The officer read the defendant his rights on several occasions and clearly conveyed to him that he did not have to talk to the officer. However, the state-appointed psychiatrist testified that the defendant was insane at the time of his confession and not competent to stand trial. According to this expert, the defendant was experiencing "command hallucinations" which interfered with his "ability to make free and rational choices." *Id.* at 161 (quoting the trial record). The defendant testified that the voice of God told him to fly from Boston to Denver and confess to the murder. *Id.*

The Court held that the defendant's statements violated neither due process nor the fifth amendment because there was no improper police conduct. According to the Court, the Constitution protects citizens from coercion by state actors, but not from their own internal nature or from conduct by third parties. *Id.* at 170-71. This suggests that the Supreme Court is allowing courts to presume voluntariness based on objective indicia such as the administration of *Miranda* warnings rather than engaging in case-by-case determinations.

124. Some commentators argue that defendants are worse off under *Miranda* because courts can look at whether warnings have been given and do not have to worry about whether a statement is actually voluntary. Rosenberg & Rosenberg, *supra* note 61, at 100 ("If *Miranda*
CONCLUSION

At the core of *Miranda* is the idea that police violate a suspect's fifth amendment rights when they use compulsion in custodial interrogations to overpower a suspect's will. But in recent years the Supreme Court has increasingly found that the interests of law enforcement in securing criminal convictions outweigh the interests of the criminal defendant in understanding her fifth amendment rights so that her confession results entirely from her free choice. While the Court appears unwilling to make "one more move" to eliminate police interrogation, in *Duckworth* it approved warnings that deviate so far from *Miranda*'s language that they arguably do not clearly inform a suspect of the rights she has when subjected to that interrogation.

Prior to *Duckworth*, the Court justified retreating from *Miranda* by emphasizing that if a defendant has received clear notice of her rights, she is sufficiently informed to make a knowing and intelligent decision about whether to waive them. In *Duckworth*, however, the Court seemed to ignore the reasoning of its prior decisions. The *Duckworth* defendant argued that he did not voluntarily waive his rights because he did not receive clear notice of them. And yet the Court held that his decision to waive those rights was informed—in spite of the fact that it could not say the warnings he received were clear.

Therefore, *Duckworth* is significant for two reasons. Unlike previous decisions it did not require the state to show that the harm to suspects—potentially confusing *Miranda* warnings—furthered a law enforcement interest in order to justify an added psychological compulsion in interrogations. Also, unlike prior decisions allowing additional compulsion so long as the warnings were at some point made clear, in *Duckworth* that additional compulsion resulted from the lack of clarity in the warnings themselves. The Supreme Court does not require that *Miranda* warnings be any clearer than the Court itself has been about the state of *Miranda* as a safeguard for the rights of criminal suspects. One thing is clear, however. Although *Miranda* is still somewhat useful to suspects and to the criminal justice system, it has been reduced to a skeleton of its former self.

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were not such a convenient backstop, the Court might be more willing to flesh out due process constraints on police elicitation of statements from suspects.

125. Grano, *supra* note 26, at 663-64.
Clara Shortridge Foltz strikes a victorious pose wearing a symbolic mortarboard and the dress in which she argued her right to attend law school.

*O. Shuck, History of the Bench and Bar of California* (1901).